

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matters of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
Of 1996)

CC Docket No. 96-98

Inter-Carrier Compensation for)
ISP-Bound Traffic)

CC Docket No. 99-68

To: The Commission

**JOINT REPLY COMMENTS OF
E.SPIRE COMMUNICATIONS, INC.;
INTERMEDIA COMMUNICATIONS INC.;
KMC TELECOM, INC.;
NEXTLINK COMMUNICATIONS, INC.;
THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES;
AND
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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e.spire Communications, Inc.; Intermedia Communications Inc.; KMC Telecom, Inc.; NEXTLINK Communications, Inc.; the Association for Local Telecommunications Services¹ and the Competitive Telecommunications Association² (collectively, the “CLEC Coalition”) hereby submit these joint reply comments in response to initial comments filed pursuant to the Public Notice issued by the Federal Communications

¹ The Association for Local Telecommunications Services (“ALTS”) is a leading industry association representing facilities-based competitive local exchange carriers (“CLECs”). ALTS filed separate initial comments in this remand proceeding on July 21, 2000 and has joined the other members of the CLEC Coalition in these reply comments.

² The Competitive Telecommunications Association (“CompTel”) is a leading industry association representing competitive telecommunications carriers and their suppliers. CompTel’s diverse membership includes integrated communications providers, CLECs, data CLECs and Internet service providers (“ISPs”).

Commission (“FCC” or “Commission”) on June 23, 2000³ requesting comments on issues raised by the remand of the Commission’s *Reciprocal Compensation Ruling*⁴ by the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit” or the “Court”).⁵ The members of the CLEC Coalition include facilities-based CLECs and two leading competitive carrier industry associations, CompTel and ALTS, that have joined together in these reply comments to emphasize that the record in this proceeding clearly supports the fundamental position espoused by the CLEC Coalition: on remand from the Court, the Commission must find that dial-up traffic delivered to ISPs (“ISP-bound traffic”) is telecommunications traffic that qualifies for reciprocal compensation under Section 251(b)(5) of the Communications Act of 1934, as amended (“Act”).

Introduction and Summary

In their initial comments in this proceeding on remand, none of the incumbent local exchange carriers (“ILECs”) spent much time on the statute that lies at the heart of this remand proceeding. The reason for this is simple: the plain text of the statute lends no support to their position. As noted by the Court and the CLEC Coalition in its initial comments, Section 251(b)(5) requires the payment of reciprocal compensation for all telecommunications traffic. ISP-bound traffic is not exempted.

To be sure, the Commission interpreted Section 251(b)(5) to require payment of reciprocal compensation for traffic that was not subject to access charges. It did so by

³ *In the Matters of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Public Notice, FCC 00-227 (rel. June 23, 2000) (“Public Notice”).

⁴ *In the Matters of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (“*Reciprocal Compensation Ruling*”).

finding that reciprocal compensation applies only to local traffic and not to toll traffic.

This is where the ILECs attempt to hang their hat. Their efforts, however, fall short.

Indeed, those efforts continue to cling to the judicially refuted notion that the ultimate end point of the communication, under an analysis that traditionally has been used by the Commission for jurisdictional purposes, is relevant for the purpose of determining whether a call is subject to reciprocal compensation under the Act and the Commission's rules. In so doing, the ILECs ask the Commission to ignore the Court's explicit instructions, and, once again, ignore its own definition of "termination". The Commission cannot do this.

Reciprocal compensation is due because a functionality or service – *termination* – is provided. It is not, as the ILECs argue, *not* due because a call that is switched and delivered by a LEC to an ISP may be connected to additional communications. The ISP's subsequent provision of enhanced services that allow end users to access local e-mail servers, local LANs, locally cached websites, or even distant web servers located across state or national boundaries, does not alter the fact that, for purposes of reciprocal compensation and consistent with the Commission's own definition, a LEC terminates telecommunications traffic when it switches and delivers a call to an ISP within the local calling area.

The ILECs do no better with the other Commission definitions that cannot be twisted to support their position. Most importantly, none contend that ISP-bound traffic is "toll" traffic. The inquiry should stop there. If ISP-bound traffic is not toll traffic, it must be "local" traffic subject to reciprocal compensation.

⁵ See *Bell Atl. Tel. Companies v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic*").

Similarly, the ILECs fail to explain why ISP-bound traffic is not “telephone exchange service”. Their efforts to classify ISP-bound traffic as “exchange access” simply ignore the fact that ISP-bound traffic does not meet the incorporated definition of “toll” traffic.

The ILECs’ attempts to analogize ISP-bound traffic to Feature Group A (“FGA”) toll access also fail to persuade. Unlike FGA, ISP-bound traffic fits squarely into the two carrier LEC-to-LEC collaborative model of completing local traffic. FGA toll access, as is revealed by its name, fits squarely into the LEC-to-IXC-to-LEC three carrier model of completing toll traffic. In either case, the terminating LEC must be compensated for performing the switching functionality and delivering the call to the called party. In the case of FGA, the terminating LEC receives access charges. In the case of ISP-bound traffic, the terminating LEC does not receive access charges, and therefore should receive reciprocal compensation.

In the end, the ILECs resort largely to policy arguments as to why they should not be required to pay reciprocal compensation to CLECs for performing termination functions that the ILECs used to provide exclusively as monopoly carriers. This heavy reliance on questionable, lightly supported and often wrong policy positions and assumptions strongly suggests that the ILECs themselves know that the statute and the Commission’s implementing rules cannot be squared to support their position that ISP-bound traffic is not subject to reciprocal compensation under Section 251(b)(5).

To be sure, the Commission can address policy concerns in its rules governing reciprocal compensation. The CLEC Coalition and numerous others have asked for such action. Indeed, the rules the Commission has in place already provide a solid foundation

for the efficient and equitable exchange of reciprocal compensation. A few additional steps, however, are necessary. First, the Commission should reiterate that ILECs are bound by the terms of their existing interconnection agreements and must pay all past due and current reciprocal compensation for ISP-bound traffic. This action will eliminate substantial litigation that has been draining the resources of the state commissions and both sides in this battle.

Second, the Commission should re-affirm its *Local Competition Order* finding that bill and keep may not be mandated when volumes of traffic exchanged are not roughly in balance. ISP-bound traffic typically generates substantial traffic imbalances. In such a case, mandatory bill and keep would result in zero compensation. Such a result is contrary to the cost-causation/cost-recovery principles embedded in the Act and, if ordered by the FCC or a state commission, likely would violate the Fifth Amendment's takings clause.

Third, the Commission should declare that reciprocal compensation mechanisms cannot be used as a means of discriminating against ISPs. Consistent with the policy behind the Commission's ESP/ISP access charge exemption, ISPs should continue to be treated no differently than any other end users. If state commissions find sufficient reason to adjust rate structures and levels, they should be required to do so based on call characteristics and termination costs – not on the identity of the end user.

Finally, no commenter offered a compelling reason why the jurisdictional nature of the telecommunications at issue is at all relevant to the application of reciprocal compensation under 251(b)(5). Nevertheless, the ILECs continue with their "if it's interstate it can't be local" argument in hopes that the Commission once again will

bypass its own functional definition of termination and instead transpose its end-to-end jurisdictional analysis on an issue that should be decided without regard to the jurisdictional nature of ISP-bound traffic. Interstate traffic is not synonymous with interexchange or toll traffic. Nor is it the opposite of local traffic. Local traffic can be jurisdictionally interstate, just as toll traffic can be jurisdictionally intrastate. The Commission should rebuff ILEC efforts to perpetuate the confusion that has been generated by collapsing the jurisdictional and reciprocal compensation inquiries into one.

As BellSouth, SBC and Verizon admit in their discussions regarding the costs of terminating traffic to ISPs, CLECs do indeed “terminate” calls to ISPs within the local calling area and costs are incurred in doing so.⁶ Section 251(b)(5) of the Act requires that reciprocal compensation be paid for the purpose of reimbursing the terminating LEC for the costs associated with performing that functionality.

I. ISP-Bound Traffic Is “Local” Telecommunications Subject to Reciprocal Compensation Under Section 251(b)(5)

In initial comments, the CLEC Coalition contended that the Court’s decision compels the conclusion that *all* telecommunications traffic exchanged between carriers for transport and termination that is not subject to access charges *is* subject to reciprocal compensation under Section 251(b)(5).⁷ ISP-bound traffic is not *toll traffic* subject to *access charges*. No party in this proceeding claims otherwise. Indeed, the record in this proceeding on remand overwhelmingly supports the conclusion that ISP-bound traffic is,

⁶ See BellSouth Comments at 14 (arguing that the costs of “terminating” traffic to ISPs is not the same as for local calls); SBC Comments at 35 (arguing that the costs to “terminate” traffic to ISPs is not the same as for local calls); Verizon Comments at 35 (arguing that the costs of “terminating” traffic to ISPs is not the same as for local calls).

⁷ E.g., ALTS Comments at n.24, 11-12 (only toll calls are excluded from the FCC’s reciprocal compensation rules); AT&T Comments at 11-12 (the FCC excluded calls subject to access charges).

in fact, *local traffic* subject to *reciprocal compensation* under Section 251(b)(5).⁸ The ILECs offered no compelling arguments to refute this conclusion.

A. The ILECs Fail to Square Their Patchwork of Arguments with the Language of Section 251(b)(5) and the FCC Rules Implementing the Statute

Not surprisingly, the ILECs bypassed any meaningful discussion of the statutory language underlying the issue before the Commission on remand.⁹ The reason for this is plain: the statutory language does not exempt ISP-bound traffic from the reciprocal compensation requirement. Indeed, as noted several times by the Court, Section 251(b)(5) “requires local exchange carriers (“LECs”) to ‘establish reciprocal compensation arrangements for the transport and termination of *telecommunications*.’”¹⁰

Instead, the ILECs try to make their case by relying on the Commission’s 1996 *Local Competition Order* decision in which it adopted rules implementing Section 251(b)(5) based on the determination that the statutory reciprocal compensation requirement in that section – which on its face applies to *all* telecommunications traffic¹¹ – reasonably could be interpreted so that it did not apply (at least for an interim period)

⁸ See also ASCENT Comments at 3, 8; AT&T Comments at 10; Cablevision Lightpath Comments at 4; Centennial Comments at 6-7; Focal Comments at 10; ICG Comments at 3; New York DPS Comments at 2; PacWest Comments at 15; California PUC Comments at 3-5; Texas PUC Comments at 1; RNK Comments at 11-16; Time Warner Comments at 5; WorldCom Comments at 16.

⁹ See, e.g., BellSouth Comments at 5 (“The Commission has consistently found that ISP-bound traffic is not local, but rather interstate traffic, and, therefore, is not subject to reciprocal compensation under Section 251(b)(5) of the Act.” (no additional analysis offered to support the contention that the “interstate” jurisdictional classification brings ISP-bound traffic outside Section 251(b)(5)’s requirement that reciprocal compensation is required for the transport and termination of all telecommunications)). Others ILECs did not even go that far. Neither Qwest, SBC, nor USTA look beyond the Commission’s rules to the underlying statutory language. Verizon, at least, started its analysis by setting forth the statutory language at issue, see Verizon Comments at 3-4, but quickly moved to the Commission’s rules and never returned to explain how its interpretation of the Commission’s rules could be squared with the language of Section 251(b)(5).

¹⁰ Bell Atlantic, at 2, 4 (emphasis added).

¹¹ Section 251(b)(5) imposes on all LECs “[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 USC § 251(b)(5).

to interexchange telecommunications traffic.¹² Based on Section 251(g), the Commission concluded that toll calls would continue to be subject to the access charges regime put in place under Sections 201 and 202 of the Act.¹³ All other traffic – local traffic – would be subject to reciprocal compensation.

Although the ILECs do not contend that ISP-bound calls are toll calls,¹⁴ they nevertheless argue (not persuasively) that ISP-bound calls are not local calls. This begs the question, “well then, what kind of calls are they?” The ILECs try to obfuscate by using the terms “access” and “interstate”.¹⁵ However, as interpreted by the Commission, for purposes of Section 251(b)(5), the relevant determination is whether traffic is *local* (subject to reciprocal compensation) or *toll* (subject to access charges).

Realizing that statutory definition of “toll” traffic provides the ILECs with no salvation,¹⁶ SBC tries to make much of the fact that access charges would/might apply but for the Commission’s 1983 ESP/ISP access charge exemption.¹⁷ This diversion also

¹² See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013 (¶¶ 1033-34) (1996) (“*Local Competition Order*”).

¹³ *Id.* Notably, ISP-bound traffic is not encompassed by the access charge regime the Commission sought to preserve by interpreting the reciprocal compensation requirement of Section 251(b)(5) to apply only to local traffic. Thus, as is the case with other local traffic, the establishment of reciprocal compensation for ISP-bound traffic will not cause ILECs to experience a reduction in access charge revenues. Instead, the effect of reciprocal compensation is that ILECs now reimburse CLECs for assuming costs they used to incur in a monopoly environment.

¹⁴ Qwest laudably admits that ISP-bound calls are neither “toll” nor “exchange access”. Qwest Comments at 12.

¹⁵ E.g., Qwest Comments at 10 (“the Commission consistently has regarded the services that ESPs purchase from LECs as ‘access’ services.”); BellSouth Comments at 5 (concluding that interstate traffic is not subject to reciprocal compensation under Section 251(b)(5)).

¹⁶ 47 USC § 153(48) provides that:

The term “telephone toll service” means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

¹⁷ See SBC Comments at 4, 24-48 (arguing that the ISP exemption does not force the conclusion that ISP-bound calls are not exchange access and ignoring the salient fact that access charges do not apply to ISP-bound traffic).

fails to support the ILECs' position. The ISP exemption does not, as SBC argues, lead to the conclusion that reciprocal compensation does not apply to ISP-bound traffic. Indeed, as the Court noted, that exemption suggests that reciprocal compensation clearly should apply, because access charges do not.¹⁸

Additional attempts by the ILECs to characterize ISP-bound traffic as "access",¹⁹ "information access",²⁰ or "exchange access"²¹ also fail to address the plain statutory requirement that reciprocal compensation be paid for the transport and termination of telecommunications. Notably, the ILECs do not present a unified front in support of the notion that ISP-bound calls are exchange access.²² Qwest affirmatively states that ISP-bound calls are not exchange access.²³ The other ILECs weakly attempt to argue the point. Their main arguments in this regard appear to be that ISP-bound traffic is "exchange access"²⁴ because (1) the Commission has used the word "access" frequently in association with ISP-bound traffic; and (2) the Commission already has concluded previously that ISPs use exchange access and that ISP-bound traffic does not constitute

¹⁸ *Bell Atlantic* at 8 (concluding that the Commission's classification of ISPs as end users exempt from the access charge regime is "something of an embarrassment" to (*i.e.*, is inconsistent with) the Commission's conclusion that reciprocal compensation also does not apply to ISP-bound traffic).

¹⁹ *See, e.g.*, SBC Comments at 24 ("ISP-Bound Traffic is Access Traffic, not Local Traffic"), *but see id.* at 22 ("Whether or not ISP Traffic is Exchange Access, Telephone Exchange Service, or Information Access is Irrelevant").

²⁰ *See* Qwest Comments at 12 (arguing that ISP-bound traffic is neither telephone exchange service nor exchange access and admitting that it is not toll either).

²¹ *See* SBC Comments at 22-23.

²² As the Court noted, the Commission already has determined that the terms "exchange access" and "telephone exchange service" occupy the field. If traffic does not fall into one of these categories, it falls into the other. *See Bell Atlantic* at 8.

²³ Qwest Comments at 12.

²⁴ 47 USC § 153(47) provides that:

The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

“telephone exchange service”.²⁵ With all due respect to the Commission, neither argument gets the ILECs around the plain fact that collaboratively provided connectivity to ISPs is not provided for the purpose of originating or terminating “toll” services.²⁶ Instead, it is provided to connect the caller to an ISP which then enables the end user to access information services.²⁷ Thus, by statutory definition, ISP-bound traffic cannot be “exchange access” traffic.

Notably, not one of the ILECs provide a compelling explanation as to why ISP-bound traffic does not fit within the definition of “telephone exchange service”.²⁸ As the CLEC Coalition and many others asserted in initial comments, ISP-bound traffic does indeed meet the definition of “telephone exchange service”.²⁹ Moreover, as the Commission acknowledged in its *Reciprocal Compensation Ruling*, ISP-bound traffic is treated as local traffic for cost allocation and separations, billing, tariffing, and dialing purposes.³⁰ The advent of local competition need not change this. In short, for reciprocal

²⁵ E.g., BellSouth Comments at 9 (citing generally *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999) (“*Advanced Service Remand Order*”)); SBC Comments at 22-24 (citing *Advanced Service Remand Order*, ¶¶ 35, 43); Verizon Comments at 9-10 (citing *Advanced Service Remand Order*, ¶¶ 15-16); but see *Advanced Service Remand Order*, ¶ 38 (declining to determine whether ISP-bound traffic collaboratively delivered to an ISP constitutes “exchange access”); *Bell Atlantic* at 9 (agreeing with Petitioner WorldCom that “ISPs connect to the local network for the purpose of providing information services, not for the purpose of providing telephone toll services”).

²⁶ See *Bell Atlantic*, at 9.

²⁷ *Id.*

²⁸ 47 USC § 153(47) provides that:

The term “telephone exchange service” means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

²⁹ E.g., ICG Comments at 8-9; Time Warner Comments at 11.

³⁰ See *Reciprocal Compensation Ruling*, ¶¶ 23-25.

compensation purposes, there simply is no justifiable reason for treating ISP-bound traffic differently from other (local) traffic that does not generate ILEC access revenues.

Perhaps in recognition of the fact that ISP-bound traffic cannot reasonably be found to fit within the definition of “exchange access”, each of the ILECs concluded that the classification of ISP-bound traffic as “telephone exchange service” or “exchange access” did not matter for the purpose of determining whether such traffic is subject to Section 251(b)(5)’s reciprocal compensation requirement.³¹ This contention goes too far.

Although neither “telephone exchange service” nor “exchange access” appear in Section 251(b)(5), or in the Commission’s rules implementing it, traffic that does not fit within the definition of “exchange access” falls outside the Commission’s access charge regime. If telecommunications traffic is not subject to access charges, it must be subject to reciprocal compensation. Section 251 provides no basis for another interpretation. Moreover, the term “telephone exchange service” appears to be synonymous with “local” service.³² Thus, under the Commission’s rules, traffic that qualifies as “telephone exchange service” certainly would appear to be subject to reciprocal compensation. As the CLEC Coalition and many others set forth in their initial comments, ISP-bound traffic fits squarely within the definition of “telephone exchange service”.³³

³¹ BellSouth Comments at 8; Qwest Comments at 11; SBC Comments at 3, 22-23; USTA Comments at 7; Verizon Comments at 9-10. Unsatisfied with the Commission’s prior determination that the two terms occupy the field, Qwest continues to maintain that such traffic is “information access”. The CLEC Coalition disagrees with Qwest’s contention. As the Court appeared to conclude, there is neither statutory language nor FCC precedent to support it. *See Bell Atlantic*, at 8-9.

³² *See Bell Atlantic*, at 8 (citing Petitioner MCI WorldCom’s Initial Brief).

³³ *E.g.*, ICG Comments at 6; Time Warner Comments at 11; WorldCom Comments at 12.

**B. The ILECs Fail to Square Their Contentions with the FCC's
Definitions of "Local" Traffic and "Termination"**

In initial comments, the CLEC Coalition asserted that the Court was correct when it determined that application of the Commission's definition of "termination"³⁴ places ISP-bound calls squarely within the Commission's definition of "local" traffic.³⁵ For purposes of reciprocal compensation, the Commission defined "termination" to mean a functionality or service performed, as opposed to a final physical stopping point (which the Commission has deemed relevant for determining the jurisdictional nature of such calls). None of the ILECs offered new or compelling reasons to refute the Court's analysis.

Under the definitions adopted by the FCC in 1996 to implement Section 251, "telecommunications traffic" is local if it "originates and terminates within the local serving area."³⁶ As indicated in the CLEC Coalition's initial comments, with respect to the application of reciprocal compensation, this compensation-related definition makes the most sense if the term "terminates" is construed as a functionality or service provided for which compensation is due, as opposed to an ultimate physical end-point of a communication.³⁷ Indeed, in 1996, the FCC properly defined "termination" – the term used in Section 251(b)(5) – as a functionality or service performed. As the Court noted,

³⁴ Section 51.701(d) of the Commission's rules defines "termination" as "the switching of local telecommunications traffic at the terminating carrier's end office switch or equivalent facility, and delivery of such traffic to the called party's premises." 47 C.F.R. § 51.701(d).

³⁵ *Bell Atlantic*, at 6 ("Calls to ISPs appear to fit this definition . . .").

³⁶ *Id.*, at 6 (47 CFR § 701(b)(1)).

³⁷ The only way in which the use of a physical stopping point makes sense is if the relevant stopping point is the point at which the terminating LEC's service ends. In the case of ISP-bound traffic, that point is at the ISP. While the Commission may or may not continue to find that the eventual end point of the total communications service (encompassing both telecom and information services) is relevant for jurisdictional purposes, clearly, the intermittent stopping point – the point at which the terminating LEC's

for the purpose of reciprocal compensation, the Commission in 1996 defined “termination” as “the switching of traffic that is subject to Section 251(b)(5) at the terminating carrier’s end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party’s premises.”³⁸

No ILEC provided a rational analysis of why calls to ISPs do not, in their view, fit within this definition. Instead, the ILECs stated that the Court was “wrong” when it concluded that “the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the ‘called party.’”³⁹ Predictably, ILECs continued to assert that termination occurs at far-off servers on the Internet and not when the LEC switches and delivers the call to an ISP within the local calling zone. However, in doing so, the ILECs continued to ignore or baselessly dismiss the legal significance of the definition of “termination” codified in FCC Rule 51.701(d).

For example, SBC attempts to dismiss the legal relevance of the Commission’s definition of “termination” by asserting that the Commission merely defined termination so as to distinguish it from transport. While the Commission’s definition clearly accomplishes that objective, SBC’s view that the definition was *not* intended to be used for the purpose of determining whether or not the requisite criteria have been met and, as a result, whether reciprocal compensation is due, is implausible. Nothing in the

service component ends – is the only point relevant for purposes of determining whether reciprocal compensation is due.

³⁸ *Bell Atlantic*, at 6 (citing *Local Competition Order*, 11 FCC Rcd at 16015 (¶ 1040); 47 CFR § 51.701(d)).

³⁹ If the Commission concludes that ISP-bound traffic is nevertheless not subject to Section 251(b)(5), it must demonstrate why ISP-bound calls constitute a class of non-toll calls that are not subject to access charges and nevertheless are exempt from the requirement that reciprocal compensation be paid for the transport and termination of *all telecommunications*.

Commission's reciprocal compensation rules indicates that they should be interpreted without reference to related rules. To do so would defy common sense.

SBC's two other attempts to get around the Commission's definition of "termination" also fail to persuade. First, SBC claims that the definition does not apply because it applies only to local traffic and ISP traffic is not local traffic.⁴⁰ SBC's circular reasoning cannot get it around the Commission's definitional language nor the fact that the functionality described in the FCC's definition is indeed performed when a call is switched and delivered to an ISP within the local calling area. Moreover, nowhere in its comments does SBC provide a compelling argument as to why ISP bound calls are toll calls and not local calls.

To be sure, SBC calls ISP-bound traffic "interstate" and it also calls such traffic "access". Neither, term however provides an answer to the question that must be answered in this proceeding. For purposes of complying with the Court's remand, the Commission must determine whether ISP-bound traffic is toll or local traffic – the terms occupy the field.⁴¹

Second, SBC (and other ILECs) asserted that when an ISP-bound call is placed, the ISP is not the "called party".⁴² Here, too, SBC asserts that the Court's contrary conclusion is "simply wrong".⁴³ SBC asserts that distant websites and e-mail servers are

⁴⁰ See SBC Comments at 20. SBC wrongly credits the Court with suggesting that ISP-bound traffic qualifies for reciprocal compensation under Section 51.7.1(d) of the Commission's rules. See *id.* Instead, the Court suggested that, when the call characteristics of ISP-bound calls are considered in light of the definition of "termination" found in Section 51.701(d) of the Commission's rules, ISP-bound traffic appears to fit within the definition of "local" traffic set forth in Section 701(b)(1) of the Commission's rules. See *Bell Atlantic*, at 6-7.

⁴¹ See *Bell Atlantic*, at 8.

⁴² SBC Comments at 3, 21; BellSouth Comments at 6-7; Qwest Comments at 7.

⁴³ SBC Comments at 21. Qwest asserts that the Court's conclusion is *dicta* and invites the Commission to ignore or under-turn it. Qwest Comments at 7. The Commission should decline Qwest's invitation. The Court's conclusion is sound.

the called party in this context. This, however, ignores the simple fact that the originating end user dials the ISP's local number to reach/call the ISP. If the end user reaches the ISP, he or she is charged for a local call and the terminating LEC charges the originating LEC reciprocal compensation. The fact that the ISP may provide access to various information services does not change this. The telecommunications link at issue in this debate over reciprocal compensation is that collaboratively provided between two end users – as the end user on the terminating side, the ISP is indeed the “called party”.

C. The ILECs Fail to Justify Their Continuing Effort to Commingle the Jurisdictional Analysis with the Reciprocal Compensation Analysis Required by the Court

Without responding to the Court's demand for a compelling rationale as to why the application of the FCC's end-to-end jurisdictional test has any relevance with respect to determining whether reciprocal compensation is due under Section 251(b)(5), the ILECs, once again, set forth the string of cases in which the Commission has used an end-to-end analysis to determine the jurisdictional nature of a call.⁴⁴ Whatever the appropriate jurisdictional outcome, the CLEC Coalition once again submits that the jurisdictional inquiry should be decided apart from the reciprocal compensation inquiry. The Court's failure to find the relevance of the jurisdictional inquiry to the issue of whether reciprocal compensation is owed is well founded. Although the ILECs continue to obfuscate and confound by commingling the jurisdictional and compensation analysis, they have not set forth a compelling reason as to why one inquiry is relevant to the other.

⁴⁴ See Qwest Comments at 7-10; SBC Comments at 10 (explaining that the Commission has used its end-to-end jurisdictional analysis for determining the regulatory status of calls, but failing to respond to the Court's request for an explanation of why that approach makes sense in the current context); BellSouth Comments at 6-7; Verizon Comments at 6-9

Just as toll traffic can be either interstate toll or intrastate toll, local traffic can be either intrastate local or interstate local. In short, and as the CLEC Coalition and many other commenters concluded, the jurisdictional nature of a call is not dispositive of whether a call is local or toll.⁴⁵ A simple finding that a call is interstate or intrastate has no bearing on whether a call is subject to reciprocal compensation or access charges. As ALTS and others noted, some interstate calls are local calls that are subject to reciprocal compensation.⁴⁶ Conversely, some intrastate calls are toll calls that are subject to access charges.

Nevertheless, as noted above, the ILECs continue to place undue reliance upon their view that the ultimate termination point (*i.e.*, farthest physical stopping point of a communication) for ISP-bound calls is at a distant point on the worldwide web. Whether or not this is true – or whether a large proportion of such calls actually have physical termination points at local e-mail servers, local LANs, or locally cached web pages – is irrelevant for the purposes of determining whether reciprocal compensation or an access charge is due. As the Court concluded, the jurisdictional nature of ISP traffic does not appear to have a bearing on whether or not such traffic is telecommunications traffic subject to reciprocal compensation under Section 251(b)(5).⁴⁷ Rather, it is the functionality or service provided – for which compensation is due – that is relevant. In the end, it is clear that the ILECs have been unable to square their arguments with respect to jurisdiction or the application of the Commission's end-to-end jurisdictional analysis

⁴⁵ *E.g.*, ALTS Comments at 6, Focal Comments at 3-7; ICG Comments at 12; Time Warner Comments at 6-10; WorldCom Comments at 1-6.

⁴⁶ ALTS Comments at n.17; Time Warner Comments at 12.

⁴⁷ *Bell Atlantic*, at 2, 3-5.

with Section 251(b)(5)'s requirement that reciprocal compensation be paid for the transport and termination of all telecommunications traffic.

D. ISP-Bound Calls Are Not Analogous to FGA or Any Other Type Of Three Carrier LEC-to-IXC-to-LEC Calling

None of the ILECs provided a compelling reason as to why the distinction between ISPs (end users) and IXC's (carriers) was not, as the Court concluded, relevant for the purposes of reciprocal compensation.⁴⁸ Many commenters, however, agreed with the CLEC Coalition and the Court, and concluded that the distinction was indeed relevant.⁴⁹ As the Court explained, as end users, "ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance providers)".⁵⁰ Thus, when ISP-bound calls are placed, two LECs collaborate to deliver a call to an end user in the same manner they do for any other type of local call.

ISP-bound calls do not fit, as the ILECs suggest, within the three carrier model employed by FGA or other types of toll traffic subject to access charges.⁵¹ Unlike FGA traffic, ISP-bound traffic does not involve an IXC providing a toll telecommunications service. With ISP-bound traffic, there is no intervening toll component and no intervening carrier subject to access charges.

⁴⁸ See SBC Comments at 2-3; Verizon Comments at 7.

⁴⁹ E.g., Time Warner Comments at 10; WorldCom Comments at 8-12.

⁵⁰ Bell Atlantic, at 7.

⁵¹ See BellSouth Comments at 17; Qwest Comments at 6, 8; USTA Comments at 4. SBC's assertion that ISP-s actually use FGA is baseless. See SBC Comments at 48.

II. The Commission Should Bolster Its Existing Reciprocal Compensation Rules to Eliminate Remaining Areas of Uncertainty and Potential Dispute

The CLEC Coalition agrees with those commenters who submitted that the Commission's reciprocal compensation rules already provide a solid foundation for the efficient and equitable exchange of reciprocal compensation.⁵² As compelled by the Court's decision and the weight of the record, ISP-bound traffic clearly is subject to reciprocal compensation under Section 251(b)(5) and the Commission's reciprocal compensation rules.

In particular, the Commission should not waiver from the principle of symmetrical cost-based compensation that it established in its *Local Competition Order*.⁵³ States should continue to establish appropriate cost-based rate structures and levels applicable to all traffic subject to reciprocal compensation.⁵⁴ CLECs should be able to continue to rely on ILEC traffic termination cost studies as a proxy for their own costs.⁵⁵ This presumption is imminently fair to ILECs, as they would continue to incur such costs in the absence of competition, and it provides an incentive for CLECs to develop more efficient methods of termination. In addition, CLECs should continue to

⁵² E.g., Sprint Comments at 2.

⁵³ E.g., Cablevision Lightpath Comments at 9-12; ICG Comments at 13; WorldCom Comments at 37-38.

⁵⁴ E.g., Time Warner Comments at 13.

⁵⁵ Verizon contends that it will be billed "upwards of one billion dollars" this year for reciprocal compensation for ISP-bound calls. Verizon Comments at 2. This figure likely represents a small fraction of the revenues Verizon took in from CLECs last year, and certainly represents an even smaller fraction of the more than \$68 billion in revenues Verizon raked in during 1999. Bell Atlantic 1999 Annual Report; GTE 1999 Annual Report. Notably, Verizon fails to point out that those reciprocal compensation bills will be based on rates imposed by/"negotiated" with Verizon – or – on rates established on the basis of Verizon's own cost studies (remarkably, Verizon's own cost studies have resulted in a dramatic reduction in those termination rates in just a few short years). Thus, the amounts billed represent costs Verizon otherwise would have had to incur in a monopoly environment.

have the option of submitting their own cost studies, if using the ILEC rate as a proxy will not be sufficient to cover costs.⁵⁶

As indicated in its initial comments, the CLEC Coalition also strongly supports the adoption of additional reciprocal compensation rules designed to provide business certainty and eliminate many of the potential battles facing LECs in ongoing and upcoming proceedings before the state commissions. Most importantly, the Commission explicitly should affirm that “bill and keep” cannot be mandated as a reciprocal compensation mechanism where traffic is not roughly in balance.⁵⁷ Indeed, any case in which the FCC or a state commission mandated bill and keep for ISP-bound traffic, or in any case where traffic exchanged is not roughly equal, would amount to an unconstitutional taking in violation of the Fifth Amendment of the US Constitution.⁵⁸ Even SBC appears to admit that, if ISP-bound traffic is subject to reciprocal compensation, bill and keep cannot be imposed.⁵⁹

Nevertheless, SBC proposes that the Commission mandate bill and keep in the event that it determines that reciprocal compensation is not applicable and that a separate intercarrier compensation mechanism must be adopted.⁶⁰ SBC’s policy-based arguments for this zero compensation proposal are unfounded, unlawful and contrary to sound

⁵⁶ E.g., Cablevision Lightpath Comments at 12; *Local Competition Order*, ¶ 1089.

⁵⁷ However, the Commission should preserve the ability of carriers to agree voluntarily to bill and keep provisions (or variations thereof) through negotiation.

⁵⁸ U.S. CONST., amend. V.

⁵⁹ See SBC Comments at 50.

⁶⁰ SBC Comments at 6-7, 49. Qwest apparently proposes bill and keep, regardless of whether Section 251(b)(5) applies. As indicated in the CLEC Coalition’s initial comments, this proposal cannot be squared with Section 251. See Qwest Comments at 17. BellSouth makes a similar suggestion coupled with an interim approach in which the two collaborating LECs would meet-point bill the ISP. This latter proposal is, of course, contrary to the policy underlying the Commission’s ESP/ISP access charge exemption.

public policy.⁶¹ First, SBC's proposal ignores the fact that costs are incurred by the terminating LEC. In the absence of cost-recovery from the cost-causing carrier, SBC suggests that the originating carrier get a free ride and that the costs associated with ISP-bound traffic should be recovered from ISPs. Indeed, adoption of SBC's proposal would constitute bad public policy -- or at least a dramatic change in current public policy -- as such a scheme surely would drive up the cost of Internet access. Failure to provide for cost recovery in cases where traffic imbalances occur -- or in the case of ISP-bound traffic in particular -- will result in uneconomic subsidization of the originating carrier by the terminating carrier. The absurd outcome of SBC's suggestion will create the perverse incentive for the more efficient terminators of ISP-bound traffic, many of whom are likely to be CLECs, to become net originators of such traffic -- thus ensuring a consumer welfare loss. Once the ILECs realize this predictable, but apparently unperceived, outcome, they will no doubt, and this time with cause, assert that mandated zero compensation would result in an unconstitutional taking.

Additionally, the CLEC Coalition reiterates its request that the Commission make clear that reciprocal compensation mechanisms may not be used as a means of indirectly discriminating against particular types of end users such as ISPs. CLECs have competed effectively to win customers in this market niche. Their success with ISPs will not, as the ILECs speciously argue, inhibit them from serving customers in other market segments. As Verizon noted, revenues from ISP-bound services account for less than ten percent of

⁶¹ Verizon makes the same policy arguments in support of zero reciprocal or intercarrier compensation for ISP-bound traffic. Verizon Comments at 11-27.

a typical CLEC's revenues.⁶² Moreover, it is absurd to suggest, as the ILECs do, that a carrier's efficiency in serving one market segment somehow implies, or requires, that carrier to be inefficient in serving adjacent product or geographic markets.

Finally, the CLEC Coalition believes that the Commission's current rules, combined with the additions suggested herein, will provide state commissions with sufficient flexibility to consider whether alternative rate structures and levels, such as the reciprocal compensation rate structure proposal supported by Sprint or the rebuttable 3:1 presumption established by the New York Commission, allow for the proper recovery of costs in a manner consistent with the Act.⁶³ If the Commission finds, as it should, that ISP-bound traffic is subject to reciprocal compensation under Section 251(b)(5), these issues are more appropriately handled by the states.

⁶² While that amount is not overwhelming, it nevertheless represents a significant revenue stream that is a key component of meeting the expectations of investors. Meeting such expectations is critical to ensure continued access to capital necessary to expand CLECs' reach into other business and even residential market segments. SBC and Verizon's argument that the payment of reciprocal compensation for ISP-bound traffic discourages residential competition is nonsense. *See* SBC Comments at 50 (citing the need for residential rate rebalancing as a reason for the relatively slower development of competition in residential markets). There are a whole host of economic, regulatory and practical factors that generally have made initial entry in the business market more attractive than initial entry in the residential market. CLECs nevertheless continue to expand their reach into all segments of the local market.

⁶³ *See* AT&T Comments at 21-22.

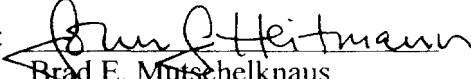
Conclusion

For all of the foregoing reasons, the members of the CLEC Coalition respectfully submit that, based on guidance supplied by the Court *and the record before it*, the Commission must find that ISP-bound traffic is “local” traffic subject to reciprocal compensation under Section 251(b)(5). Application of the Commission’s own functional definition of “termination” can lead to no conclusion other than that the compensable functionality or service is provided and a call “terminates”, for reciprocal compensation purposes, when it is switched and delivered by a LEC to an ISP. Provided that an ISP is located within the local serving area, ISP-bound traffic falls well within the Commission’s definition of “local” traffic. On this basis and in recognition of the fact that ISP-bound traffic is not “toll” traffic subject to access charges, the Commission must find that ISP-bound traffic is subject to reciprocal compensation under Section 251(b)(5). Based on this finding, the Commission can put an end to ongoing litigation by declaring that ILECs are bound by the terms of their existing interconnection agreements and must pay all past due reciprocal compensation. In addition, the Commission should take steps to eliminate future disputes between carriers by affirming that (1) bill and keep cannot be

mandated when traffic exchanged is not roughly in balance, and (2) reciprocal compensation mechanisms cannot be used as a means of indirectly discriminating against ISPs.

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I, John Heitmann, hereby certify that copies of the foregoing Joint Reply Comments were served on August 4, 2000, by messenger on the following persons.



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